90-1465

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA,
Respondents,

v.

COLUMBUS COUNTRY CLUB,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that the religious organization exemption of the Fair Housing Act encompa ses only those nonprofit societies which have a "mutual relationship" with a religious organization?

2. Assuming the Court of Appeals' interpretation of the religious organization exemption is correct, did the Court err in failing to find that a mutual relationship exists between the petitioner Columbus Country Club and the Catholic Archdiocese of Philadelphia, where for the past 70 years the Church has granted the community special permission to have mass said in the community's chapel, the Church provides the community with the services of a priest to lead the Sunday liturgy and other religious services held throughout the summer, and the community contributes monetarily to the Church?

3. Does a summer faith community which has been granted special permission by the Catholic Archdiocese to conduct mass on its premises; which is provided by the Archdiocese with the services of a priest to lead the weekly liturgy; and whose members hold religious services together on a daily basis fall within the plain meaning of either a "religious organization" or a "nonprofit organization operated . . . in conjunction with a religious organization" within the meaning of the religious organization exemption of the Fair Housing Act, 42 U.S.C. § 3607(a)?

4. Did the Court of Appeals err in holding that the petitioner, Columbus Country Club, a 70 year old nonprofit corporation which is genuinely selective in admission of its members; which has a limited number of members (44 families); which was organized for the noncommercial purposes of social and religious interaction; which observes formalities regarding its meetings, by-laws, etc; whose members completely own and control its operations; which provides bungalows for its

members; and whose by-laws require its members to be Catholic and occupy their bungalows during the summer season does not meet the requirements of the private club exemption of the Fair Housing Act?

5. Whether the Fair Housing Act's requirement that a genuine summer religious community must admit people of all faiths violates the religious and associational rights of the community's members under the First Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to the proceedings are the petitioner Columbus Country Club and the respondent United States of America.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA,
Respondent,

v.

COLUMBUS COUNTRY CLUB,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Columbus Country Club, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on October 12, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 915 F.2d 877 (3d. Cir. 1990); a copy of the slip opinion is reprinted in the appendix hereto, p. A-2, *infra*. A petition for rehearing was filed and denied by the Court of Appeals. *See A-1*.

The memorandum decision of the United States District Court for the Eastern District of Pennsylvania (Fullam, P.J.) has not been officially reported. The

memorandum decision is reprinted in the appendix hereto, p. A-29 *infra*.

JURISDICTION

On October 12, 1990, the Court of Appeals for the Third Circuit filed an opinion reversing the district court's grant of summary judgment in favor of petitioner Columbus Country Club, and remanding the case for further proceedings. On December 18, 1990, the Court of Appeals denied a Petition for Rehearing.

This Court has jurisdiction to review the judgment of the Third Circuit under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

This Petition requests this Court to review the Court of Appeal's interpretation of the religious organization and private club exemption of the Fair Housing Act:

42 U.S.C. § 3607(a)(1988) provides:

> **§ 3607. Religious organization or private club exemption**
>
> (a) Nothing in this title shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this title prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from

> limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.
>
> The First Amendment is implicated in this case:
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, . . .

U.S. Const. Amend. 1.

In general, the provisions of the Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), as amended, 42 U.S.C. § 3601 *et seq.* are at issue:

> As made applicable by section 803 [42 U.S.C. § 3603] and except as exempted by sections 803(b) and 807 [42 U.S.C. §§ 3603(b), 3607], it shall be unlawful-
>
> (a) To refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of . . . religion, sex, . . .

42 U.S.C. § 3604(a).

STATEMENT OF THE CASE

Respondent, United States of America, Department of Justice, instituted this suit in the Eastern District of Pennsylvania against Petitioner, Columbus Country Club (the CCC), a non-profit summer religious community, alleging religious and sexual discrimination in violation of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1988). The District Court had subject matter jurisdiction in this case pursuant to 28 U.S.C § 1345 and 42 U.S.C. § 3614, recodified as 42 U.S.C. § 3614 (West 1990 Supp.).

The CCC is a summer faith community comprised of Roman Catholic families who celebrate their religious beliefs and practices together by living in a community during the summer months, saying the rosary[1] together each evening and celebrating mass together in the chapel located on the community's grounds each Sunday, on the Fourth of July, and on August 15, a "holy day of obligation" on which all Catholics celebrate their liturgy. The community is located on a parcel of land along the Delaware River, approximately 20 miles north of center city Philadelphia, Pennsylvania; families reside in bungalows located on the grounds from June through August each year. The CCC was first organized in 1920 by the Knights of Columbus, a Roman Catholic men's organization, and was formally incorporated as a non-profit corporation in 1922. That same year, the Archbishop of Philadelphia granted the CCC special permission to have mass celebrated on its grounds on each Sunday during the summer season. Since 1922, the petitioner has retained this rare privilege, being the only community of this type to have been granted permission by the Church to have mass said outside of a parish church on a regular basis. In addition, since 1922, Philadelphia's Catholic Archdiocese has provided the community with the services of a priest to lead the

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1. The rosary is a Catholic practice consisting of recitation of prayers while meditating on mysteries of the faith.

weekly liturgy and any other special religious ceremonies in which the members of the community may partake. During the Sunday mass in the CCC's chapel, a collection is taken up and all of the donations are turned over to the Church.

The members of the CCC gather each evening in the chapel located on the community's grounds for the saying of the "evening family rosary;" this practice was initiated during World War II to pray for the members' sons who were fighting in the War. Statuary of religious significance are located in a grotto on petitioner's property; members of the community use this area for quiet reflection.

The organization issues annual, associate and social memberships. Annual members are those members who own bungalows and who vote on all matters affecting the organization. Spouses elect among themselves each year which person from their bungalow will serve as the annual member; one person per bungalow is permitted a vote. Prior to 1987, only men were permitted to serve as annual members; the CCC's by-laws were changed in 1987 to allow women to serve as annual members and thus vote as the representative from their family. From the organization's inception, women could occupy the bungalows and use all other facilities on the CCC's premises. Associate members are those adults over the age of 21 who live in the bungalows throughout the summer, but who do not serve as the annual member. Social memberships are issued to the annual members' close friends and relatives who do not occupy the bungalows throughout the summer, but who attend the Fourth of July celebration and other social events held on the community's grounds.

The organization is completely owned and operated by the annual members. To assure that the members share a common interest in the religious aspects of the community, the CCC requires that the annual member be a practicing Roman Catholic in good standing with his or her parish church, as attested in writing by their

parish priest. Since 1922, annual membership has been limited to Catholics. Each prospective new annual member is interviewed by 3 persons from the 12-person Board of Governors. The applicants are questioned as to their interest in living in a cooperative community throughout the summer and as to their interest in participating in the religious association taking place in the community. Because the vast majority of applicants are the sons, daughters or close friends of existing members, and therefore are well known to the members, a lengthy admissions interview is unnecessary in most cases.

The United States Department of Justice brought this suit alleging religious discrimination arising out of the community's restriction of its membership to Catholics. Although the organization's by-laws were amended in 1987 to allow women to be voting members, and a number of women are now annual members, the complaint also alleges sexual discrimination based on the CCC's past history of discrimination, and seeks a permanent injunction prohibiting a return to the old practices.

Upon consideration of the parties' cross-motions for summary judgment, the District Court entered partial summary judgment in favor of petitioner CCC, holding that the CCC was exempt from the provisions of the Fair Housing Act under both the Act's religious organization exemption and the Act's private club exemption.

The religious organization exemption provides:

> Nothing in this subchapter shall prohibit a religious organization, association, or society, or any non-profit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from

> giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

42 U.S.C. § 3607(a). Thus, the religious organization exemption permits religious organizations, as well as non-profit organizations "operated, supervised, or controlled by or in conjunction with" religious organizations, to limit the occupancy, sale or rental of their housing to members of the same religion.

Although the District Court rejected the CCC's argument that the community was itself a religious organization, the Court did hold that the CCC was a "non-profit organization operated . . . in conjunction with a religious organization." In finding that the religious organization exemption applied to the CCC community, the District Court examined the relationship between the CCC and the Roman Catholic Church, and concluded that the petitioner operates "in conjunction with" the Roman Catholic Church; the District Court further found that "by virtue of its ability to grant or withhold the privilege of holding religious services in the club chapel" and its singular ability to provide the community with a priest to lead these services, the Catholic Archdiocese possesses a significant degree of control over the CCC. *See infra A-36.*

In addition, the District Court concluded that the CCC met all of the requirements of the private club statutory exemption, which states:

> Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

42 U.S.C. § 3607(a) (1988). Thus, the private club exemption allows private clubs to restrict the rental or

occupancy of its lodgings to its members, provided that the housing is not operated for a commercial purpose.

The District Court held that Congress did not intend to prohibit religion-based discrimination under the circumstances posed by this case. Although the District Court found that the private club exemption applied to the CCC community, the court nevertheless initially denied summary judgment on all issues relating to sex-discrimination, as the court found that there was an issue of material fact as to whether a woman was denied membership in retaliation for her complaints about discrimination.[2] The United States filed a motion for reconsideration, arguing that because the District Court found that the CCC was exempt from the Fair Housing Act under the private club exemption, neither the religious nor sex discrimination claims could be asserted against the CCC. The District Court granted the motion for reconsideration and dismissed the action in its entirety, with prejudice. *See infra* A-40.

Because the District Court held that the CCC was exempt from the Fair Housing Act's prohibitions against discrimination, the District Court did not address whether the application of the Fair Housing Act to the CCC community violated the First Amendment to the United States Constitution.

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2. In addition to an injunction prohibiting the organization from limiting its annual membership to men, the complaint sought an injunction ordering the community to admit Ms. Anita Gualtieri to annual membership. According to the United States, Ms. Gualtieri allegedly has been denied annual membership in retaliation for her efforts to force the CCC to change its by-laws to permit women to serve as annual members. The CCC disputes this allegation, as Ms. Gualtieri was very well-known to all of the members of the community, as she had spent her childhood summers there, and she was rejected because she had a long history of a lack of cooperation with the other members of the community and had expressed her lack of interest in the religious aspects of the community.

Respondent United States took an appeal to the Third Circuit from the District Court's entry of judgment in favor of the CCC. A divided panel of the Third Circuit reversed the District Court, concluding that as a matter of law, the CCC had failed to sustain its burden of showing that the organization falls within the exemptions.

Without citing any authority or rationale for its conclusion, the Third Circuit held that the statutory phrase "non-profit organization operated, supervised or controlled by or in conjunction with a religious organization, . . ." requires that there be a "mutual relationship" between the non-profit society and a religious organization. *See infra A-15*. The Third Circuit reached this conclusion despite the broad phraseology chosen by Congress for the exemption, and the plain meaning of the phrase "operated in conjunction with." The Court further held that despite the Catholic Church's granting of special permission to the community to hold mass on the community's grounds, the Church's provision of the community with a priest to lead the Sunday liturgy as well as other religious services, the Church's approval and support of the community's activities, the community's weekly monetary donations to the Church and the community's inability to conduct most of its religious services without the help of the Church, there was no "mutual relationship" between the CCC and the Church.

The Third Circuit erroneously characterized the CCC as arguing that the religious organization exemption should be interpreted broadly. Instead, the CCC argued that the exemption should be read according to its plain meaning, and that the community fell well within the plain reading of the statutory language.

The Third Circuit rejected the CCC's argument that the community was also exempt from the dictates of the Fair Housing Act under the private club exemption. Despite the plain meaning of the term "lodgings," the

Third Circuit concluded that the community's bungalows were not lodgings. In addition, the Third Circuit held that the community's refusal to allow the sale of a bungalow to a non-Catholic was not exempt from the Act, despite the language of the exemption which allows a private club to limit the rental and occupancy of its lodgings to its own members. The Third Circuit acknowledged that the CCC did in effect limit the occupancy of the bungalows, as the CCC requires its members to occupy their bungalows during the summer season, and thus limits the "occupancy" of the lodgings. Further, although each bungalow is owned by the individual member, the ground on which the bungalow sits is owned collectively by the organization's members, and each family pays a substanial annual "leasehold rental." Despite these undisputed facts, the Third Circuit held that the CCC did not qualify for the private club exemption.

The Third Circuit casts the community as a summer recreational resort. Although it is true that the grounds contain certain outdoor recreational facilities such as a playground and basketball court for the numerous children of the members, the mere existence of these does not change the religious character of the community. The "swimming area" referred to by the Court consists of the Delaware River.

The Court of Appeals declined to address the CCC's claims that application of the Fair Housing Act to the community violated the free exercise and establishment clauses of the first amendment, as well as the community members' right to free association. The Court stated that the District Court should first address these arguments.

The author of the dissenting opinion agreed with the trial court's conclusion that the community was exempt from the Act under the religious organization exemption. *See infra* A-21.

Petitioner CCC's petition for rehearing in banc was denied by the Third Circuit. *See infra* A-1.

REASONS FOR GRANTING THE WRIT

I. THIS CASE NECESSITATES SUPREME COURT REVIEW BECAUSE OF THE FIRST AMENDMENT CONSTITUTIONAL ISSUES IMPLICATED BY THE APPLICATION OF THE FAIR HOUSING ACT TO PRIVATE RELIGIOUS CLUBS, AS WELL AS THE NATIONAL SIGNIFICANCE THE THIRD CIRCUIT DECISION WILL HAVE ON RELIGIOUS SOCIETIES AND PRIVATE CLUBS. THIS CASE PROVIDES THIS COURT WITH THE OPPORTUNITY TO CLARIFY THE BREADTH OF CONSTITUTIONALLY PROTECTED FREEDOM OF ASSOCIATION.

This Court should issue a writ of certiorari in this case because the effect of the Third Circuit decision is to create a substantial infringement on the free exercise and associational rights of the members of faith communities or genuine private clubs. This case presents this Court the perfect opportunity to define the protection afforded to members of private clubs under the United States Constitution.

A. *Application of the Fair Housing Act to the CCC violates the members' Associational Rights*

> "The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." [*Moose Lodge No. 107 v. Irvis*,] 407 U.S. 163, 179-180. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.

Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974).

In recent cases, the Supreme Court has reaffirmed its previous decisions upholding constitutionally protected freedom of association in two senses: freedom of intimate association and freedom of expressive association. *See Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987) ; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *See also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) ("The ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals against the government. Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized . . ."). Where application of a law affects in a significant way the ability of individuals to form associations for advocating their personal viewpoints, or undermines the associational or expressive purposes of a private club, the law as applied is unconstitutional. *Id.*; *Rotary*, *supra*. Despite the Court's recognition of the constitutional protection afforded freedom of association, the Court concluded in *Roberts* and *Rotary* that the organizations at issue were not entitled to discriminate on the basis of sex. Unlike the laws at issue in *Rotary*, *supra* and *New York State Club*, *supra*, the application of the Fair Housing Act to the CCC does affect in a "significant way" the ability of individuals to form associations that will advocate public or private viewpoints. *Id.* at 13, *quoting Rotary*, *supra* at 548. Application of the Act to the CCC requires the community to abandon and alter its religious association which is protected by the First Amendment, erecting an obstacle to the community's ability "to exclude individuals who do not share the views that the club's members wish to promote." *New York State Club*, *supra* at 13.

In *New York*, this Court noted that "[i]t is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share . . . the same religion." 487 U.S. at 13. This case affords the Court an excellent opportunity to enlighten the courts and litigants as to those relationships which warrant constitutional protection under the rubric "freedom of association."

The above-quoted language is directly applicable to the CCC. In *Roberts*, *supra*, the Court held that only relationships with the qualities of "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship . . . are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." 468 U.S. at 620. The CCC community possesses all of those characteristics of private clubs which this Court has noted warrant constitutional protection. The community is relatively small, being limited in size to 44 families. Despite the availability of land for expansion, the CCC has not permitted any new bungalows to be built since the early 1970s. Until that time, the expansion of the community took place at a slow rate, primarily as more bungalows were needed for the grown children of members. The community does not advertise for new members, relying solely on word of mouth of the existing members whenever a bungalow becomes available for sale. Most of the new members are the sons and daughters of existing members. In fact, the community existed virtually unnoticed by the world until a disgruntled daughter of a member complained to the Department of Justice. The CCC is genuinely selective in choosing its members, allowing as members only Catholics who are interested in living throughout the summer in a cooperative faith community. The CCC is not operated for commercial gain. The CCC has a

genuine associational purpose: religious expression; and thus requires constitutional protection. Surely, to force the admission of persons who either espouse contrary views or whose presence is inimical to the views of the CCC members plainly interferes with the right of expressive association and will impede the organization's ability to disseminate its preferred views.

Although the Third Circuit declined to address the constitutional issues raised by the facts of this case, petitioner CCC respectfully requests this Court to grant a writ of certiorari to review the constitutionality of the Third Circuit's interpretation of the Act, as well as the constitutionality of the application of the Act to the CCC community. Review is necessary to clarify the state of the law in this area. Three times before, this Court was persuaded that the question of the violation of the constitutional rights of private club members was sufficiently important to warrant plenary review.

B. *Application of the Fair Housing Act violates the members' rights under the Free Exercise Clause*

The religious organization exemption embodies a congressional sensitivity to first amendment rights: The exemption reflects a congressional attempt to accomodate religious exercise and to avoid governmental entanglement with religion. Despite this clear congressional purpose, the Third Circuit interpreted the exemption, in particular the phrase nonprofit organization "operated in conjunction with religious organizations," more narrowly than its ordinary meaning, to include only those nonprofit societies which have a "mutual relationship" with religious organizations. The actual, practical effect of the Third Circuit's decision is to deprive members of a genuine faith community of the religious experience of gathering together for a summer retreat of weekly and daily worship. Had the Third Circuit interpreted the exemption in accordance with the clear congressional

intent expressed in the plain meaning of the words, the Court could have avoided the constitutional questions now at issue.

This Court recently summarized the protection encompassed by the Free Exercise Clause:

> The Free Exercise Clause we have noted, "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasion thereof by civil authority." *Abington School Dist. v. Schempp*, 347 U.S. 203, 222-23 (1963). Indeed, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Our cases have established that '(t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner*, 490 U.S. __, 104 L.Ed.2d 766 (1989)(citations omitted).

Jimmy Swaggart Ministries v. Calif. Equalization Board, 493 U.S. __, 107 L.Ed.2d 796; 806 (1990).

Although Catholic dogma does not require members of the Catholic faith to live in summer communities, the Catholic Church permits and approves of the practices of the community, and recognizes the assembly of a community of believers as an integral facet of the practice of Catholicism. The diffusion of the CCC community with people of other faiths, or of no faith, would destroy the community members' observation of the central religious practice of living and worshipping in a community of members of their own religion. For the Catholics involved herein, the pursuit of their faith

involves having a summer retreat in which they use their evening and weekend time to pray and/or meditate together.

The remedial goal of the Fair Housing Act is to eliminate discrimination in housing, and thus permit those groups of people who historically have suffered with regard to their access to decent living conditions, employment, education and health care the opportunity to choose where and under what conditions they will live. This substantial governmental interest does not outweigh the free exercise rights of the CCC members in this case, as application of the Act will do little in terms of accomplishing this aim. Numerous summer vacation communities exist which are not religiously motivated and which offer equivalent, and in most cases, much more luxurious accomodations than those existing on the community's grounds. The CCC community may be fairly characterized as a working-person's club.

The effect of the Third Circuit's decision is broad and of national significance, as the Third Circuit's restrictive interpretation of the religious organization exemption makes it impossible for groups of people belonging to those faiths which lack a structured, hierarchical church body to meet the majority's "mutuality" standard. For example, the Quaker faith lacks any church body or official church leaders, as each member of the faith is considered a minister of the faith. Action is taken when the group is in substantial unity - no formal vote is taken; there is no such thing as a decision made by a majority, nor is there any recognized concept as "church approval." There is no separate governing body or church entity with which the members of the faith can maintain a "mutual relationship." Thus, a summer camp formed by Quaker families who want to live in a community to abide by the principles of the Quaker faith through study, prayer, meditation and attendance at regular Meetings for worship could never qualify for the religious organization exemption under the Third Circuit's mutuality test, regardless of how sincere or strong

their religious mission may be. Consider also a group of Jews who establish a summer camp for Jewish families wishing to hold Friday evening and Saturday services together, learn Hebrew, and study the Torah. With what religious organization could this "camp" maintain a "mutual relationship" so that the organization could meet the Third Circuit's reading of the exemption?

Other litigation involving communities such as the CCC shows that faith communities similar to the one at issue here do exist, and thus the Third Circuit's decision is of national impact. *See e.g. Cowen v. Lily Dale Assembly*, 44 A.D.2d 772, 354 N.Y.S.2d 269 (1974); *Lake Brady Spiritualists Camp Ass'n v. Brown*, 62 Ohio St. 2d 43, 402 N.E.2d 1187 (1980).

C. *Application of the Fair Housing Act to the CCC violates the Establishment Clause*

The religious organization exemption was also intended to avoid governmental entanglement with religion. This Court has interpreted a similar religious organization exemption contained in the Civil Rights Act of 1964 as representing a congressional intent to alleviate significant governmental interference with the ability of religious organizations, associations and communities to define and carry out their religious missions, and to avoid any intrusive inquiries into religious beliefs and practices. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day St. v. Amos*, 483 U.S. 327 (1987) (Section 702 of the Civil Rights Act of 1964 which exempts religious organizations from Title VII of the Act's prohibition against religious discrimination in employment was designed to minimize governmental "interference with the decision-making process in religions"). Similar to Title VII of the Civil Rights Act of 1964, the Fair Housing Act was enacted as part of an ongoing congressional effort to eliminate discrimination. *See* Hearings on S.1358, S.2114 and S.2280 Relating to Civil Rights and Housing Before the Subcommittee on Housing and Urban Affairs, 90th Cong., 1st Sess.

(1967). Congress created religious organization exemptions in both Acts. There is no reason to believe that Congress abandoned its First Amendment sensitivity in the context of the Fair Housing Act.

In order to pass constitutional muster under the Establishment Clause, the law must pass the three-pronged *Lemon* test, that is, the law must have a secular purpose; the law must not have the primary effect of advancing religion; and the law must not lead to an "excessive governmental entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1963). The Third Circuit's interpretation of the religious organization exemption violates the third prong of the *Lemon* test. The Third Circuit's interpretation of the exemption results in the court imposing a particular structure or relationship between the religious organization and the non-profit organization. In other words, the court is requiring that the Church approve the organization's by-laws or supervise the activities of the organization. The "mutuality" test requires the court to inquire into and monitor the behavior of the two entities. An adequate level of supervision requires extensive and permanent monitoring of the non-profit organization and the Church with which the organization is associated, thus causing the government to intrude unduly in the day-to-day operations of religiously affiliated organizations. This kind of interference with the internal affairs and workings of religious groups is clearly prohibited by the Establishment Clause. In addition, a court may not constitutionally require that a Church and another organization maintain a certain level of interaction.

This Court should grant a writ of certiorari to resolve these pressing constitutional issues.

II. THE THIRD CIRCUIT'S INTERPRETATION OF THE RELIGIOUS ORGANIZATION EXEMPTION IS CONTRARY TO THE PLAIN MEANING OF THE EXEMPTION LANGUAGE, IN DISREGARD OF THE BASIC PRINCIPLES OF STATUTORY INTERPRETATION SET FORTH BY THE SUPREME COURT. THE COURT SHOULD DECLARE WHAT CONSTITUTES A "RELIGIOUS ORGANIZATION" OR A "NONPROFIT ORGANIZATION OPERATED IN CONJUNCTION WITH A RELIGIOUS ORGANIZATION."

The Third Circuit's interpretation of the religious organization exemption contravenes basic principles of statutory interpretation. It is well-settled that in interpreting a statute, the Court must begin with the language chosen by Congress, and assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962). In the absence of a "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *American Tobacco*, *supra* at 68, *quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The CCC falls within the plain meaning of the statutory exemption. The CCC is a "religious organization," insofar as the community is an association of Catholic families, organized as a nonprofit corporation, having the common interest of living in a summer community together to bear witness to the teachings of the Catholic Church and worship together on a daily basis. It is undisputed here that the CCC is a genuine faith community and that its religious mission in not pretextual. The United States does not dispute that the CCC, which was formed 48 years prior to the enactment of the Fair Housing Act, was not organized on a religious pretense to avoid the dictates of the Act.

Several state courts have held that communities similar to the CCC are religious institutions or organizations. In *Cowen v. Lily Dale Assembly*, *supra*, the court held that a corporation comprised of members of the "Lily Dale Assembly" which was devoted to "benevolent, charitable, literary and scientific purposes and mutual improvement in the religious knowledge of Spiritualism" was a religious institution within the meaning of a statutory exemption permitting religious organizations to limit the sale or rental of housing to persons of the same religion. 44 A.D.2d at 773, 354 N.Y.S.2d at 270. In *Lake Brady Spiritualists Camp*, *supra*, the Supreme Court of Ohio held that a summer camp, consisting of a church building, a hotel building and 36 cottages, formed for people who share a common belief in Spiritualism and the "Infinite Intelligence" and who had gathered since the early 1900's for religious services, lectures, healing services, rummage sales and cookouts was a religious organization and therefore was entitled to obtain a charitable bingo license. The plain meaning of the phrase "religious organization" necessarily encompasses organizations like the CCC.

In drafting the religious organization exemption, Congress chose to exempt nonprofit organizations "operated, supervised or controlled by or in conjunction with a religious organization." The words and phrases are used in the disjunctive form. Hence, the statute applies to any nonprofit organization that is "operated by" or "supervised by" or "controlled by" or "operated in conjunction with" or "supervised in conjunction with" or "controlled in conjunction with" a religious organization. Given the broad language of the exemption, the relationship between the nonprofit organization and the religious organization may consist of anything ranging from a formal, highly structured, hierarchical relationship to an informal, loosely-structured relationship.

At the very least, the community falls within the meaning of the phrase nonprofit organization "operated in conjunction with" a religious organization, as the

CCC operates in conjunction with the Catholic Archdiocese. The CCC is undoubtedly associated and affiliated with the Catholic Church. Church doctrine emphasizes the celebration of the liturgy, which is the central act of Catholic worship, as a communal endeavor. The Church recognizes and encourages daily communal prayer, such as the daily saying of the rosary, as a desirable expression of the faith. The Church approves of the CCC members' practice of assembling together each summer for a retreat of weekly worship and daily prayer, and recognizes the community's practices as an acceptable way for Roman Catholics to manifest their communal faith. The community members follow the principles of the Church regarding Christian living and communal worship. The Church receives a monetary contribution in the form of the collection plate donation from the community each week during the summer.

The Church has been involved with the community and has supported the CCC in its religious activities from the CCC's very inception: For the past 68 years, the Archdiocese of Philadelphia has granted the CCC the rare privilege of having mass said on its grounds, and has provided the CCC with the services of a priest to lead this liturgy. By allowing the mass and providing a priest, the Church makes it possible for members of the community to pursue the religious activities which are essential to the community's existence as a faith community.

Assuming that "mutuality" is the proper test under the religious organization exemption, the Third Circuit erred in failing to find that a sufficient mutual relationship exists between the community and the Church. In examining the connection between the Roman Catholic Church and community, the Third Circuit overlooked the significant fact that the Archdiocese provides the community with the services of a priest to lead Sunday mass each week and for all other special spiritual ceremonies. The Third Circuit majority failed to recognize the significance of the availability of a

priest to lead Sunday mass, insofar as it would be absolutely impossible for the community to continue in its present mode as a faith community without the priest to say mass. Catholic dogma provides that only an ordained priest may lead the liturgy; further, Church doctrine obligates members of the faith to attend mass each Sunday.

While it is true that the 1987 amendments to the CCC by-laws officially added the requirement that an applicant provide a letter from his or her parish priest attesting to the applicant's "good standing" with the Church, it is undisputed that this has always been a requirement for membership. Further, any language regarding the religious purpose of the community simply reflects what has always been the CCC's religious mission since its inception in 1920. The United States does not dispute that the catholicity of the organization has always been viewed as the most important aspect of the CCC, and is the factor which distinguishes this community from other summer housing developments.

This Court should issue a writ of certiorari to resolve the question of which societies are exempt under the religious organization exemption of the Fair Housing Act.

III. THIS COURT SHOULD RESOLVE WHICH ORGANIZATIONS QUALIFY FOR THE PRIVATE CLUB EXEMPTION TO THE FAIR HOUSING ACT.

The Third Circuit's interpretation of the private club exemption is logically inconsistent with the other provisions of the Fair Housing Act.

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a *dwelling* to any person because of . . . religion . . ." 42 U.S.C. § 3604(a)(emphasis added). "Dwelling" is defined as

> any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. § 3602(b)(1988). Thus, before the housing at issue in a given case is subject to the Act's provisions, the housing must fall within the definition of "dwelling" as set forth above.

The private club exemption permits private clubs to limit the rental or occupancy of "lodgings" which the club owns or operates for non-commercial purposes to its members. 42 U.S.C. § 3607(a).

Despite the absence of any support in the plain reading of the exemption or in the legislative history, the Third Circuit concluded that Congress intended to limit the term "lodging" to something less than its ordinary meaning, and held that "lodgings" means temporary accomodations rather than dwellings. The Third Circuit failed to recognize the logical inconsistencies in this interpretation. If the housing or shelter at issue is something less than a dwelling, that is, if the housing is merely a temporary accomodation, rather than a building intended for occupancy as a residence, then the housing would not be subject to the Act's provisions in the first instance under § 3604(a) of the Act. Thus, a private club which provides "lodgings" as defined by the Third Circuit would never need to rely on the private club exemption to the Act because the Act only prohibits discrimination with regard to dwellings. The Third Circuit's narrow interpretation of the term lodging not only robs the word of its ordinary meaning (Webster's equates the term lodging with dwelling), but also renders the entire exemption mere surplusage.

Consider, for example, a private golf club which has bunks or rooms available for members or guests who

want to spend an occasional night on the club's premises. Because such a club's sleeping units are intended for use of a limited duration, they would not be dwellings within the meaning of the Act, and therefore, the golf club would not be subject to the Act's provisions in the first instance. Such an organization which provides temporary accomodations would never need to avail itself of the private club exemption. Thus, "lodgings" must necessarily be equivalent to "dwellings" in order for the private club exemption to have any meaning.

The Third Circuit reportedly finds support for its limited reading of the term "lodging" in the comments made by a single senator on the Senate floor. It is well-settled that the "contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety*, *supra* at 118, *citing Chrysler Corp. v Brown*, 441 U.S. 281, 311 (1979). Further, although the comment suggests that the exemption is limited to bona fide private clubs, in no way does the statement indicate that the term lodging is intended to mean temporary accomodations. Moreover, the Third Circuit unfairly fails to cite the remainder of the comments which explain that the changes in the exemption were intended to "eliminate . . . the possibility of a developer attempting to discriminate in the sale of tract homes by labeling the tract a private club." 114 Cong. Rec. 5526 (Mar. 6, 1968). Unquestionably, this case does not involve a developer who discriminates in the sale of homes under the guise of being a private club. No tracts of the CCC's land have ever been sold; no profit is made by the CCC. The collective membership owns the ground, and always has owned the ground since the organization first began in 1920.

Finally, although the Third Circuit recognizes that the CCC limits both the rental of the land on which each bungalow sits, and limits the occupancy of the bungalows to its Catholic members and their families, the Third Circuit nevertheless holds that the CCC does not

qualify for the exemption because the CCC also limits the sale of the bungalows. CCC maintains that the community is entitled to the protection of the exemption, as the CCC does limit the rental and sale of its lodgings.

CONCLUSION

For these various reasons, petitioner Columbus Country Club respectfully requests that this petition for certiorari be granted. Given the scope of the infringement of the constitutional rights of the community members and the broad-reaching effect of the Third Circuit's decision, this Court should finally decide this case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1196

UNITED STATES OF AMERICA

Appellant

v.

COLUMBUS COUNTRY CLUB

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 87-8164)

ORDER SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, *Chief Judge*, and SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and SEITZ, *Circuit Judges*

The petition for rehearing filed by appellee in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in the regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Chief Judge Higginbotham and Judge Mansmann would grant rehearing by the court in banc for the reasons set forth in Judge Mansmann's dissent. Judges Scirica, Nygaard and Alito would grant rehearing by the court in banc.

BY THE COURT:

Circuit Judge

DATED: DEC. 18, 1990

Filed October 12, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1196

UNITED STATES OF AMERICA,

Appellant

v.

COLUMBUS COUNTRY CLUB

Appeal from the
United States District Court
for the District of Eastern Pennsylvania
(D.C. Civil No. 87-8164).

Argued August 14, 1990

BEFORE: MANSMANN, GREENBERG
and SEITZ, *Circuit Judges*.

(Filed: October 12, 1990)

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

The government appeals from two orders of the district court resulting in the dismissal without trial of its action to enforce Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), as amended, 42 U.S.C. § 3601 *et seq.* (1988). Jurisdiction in the district court was based on 42 U.S.C. § 3613 (1982), recodified at 42 U.S.C. § 3614 (1988), and 28 U.S.C. § 1345 (1988). We have jurisdiction under 28 U.S.C. § 1291 (1988).

I.

The facts material to our disposition are not in dispute. The Columbus Country Club (defendant) was formed in 1920 by the Knights of Columbus, a Roman Catholic men's organization, and incorporated in 1922 as the Tri-Council Country Club. It changed its name to the Columbus Country Club in 1924. In 1936, defendant eliminated the requirement that members belong to the Knights of Columbus but retained the requirement that members be Catholic males. There is no legal relationship with the Knights of Columbus.

Defendant presently maintains a community of 46 summer homes (called "bungalows") located on a 23-acre tract of land along the Delaware River north of Philadelphia. Defendant's by-laws prohibit members from occupying their bungalows from October through April. Even if a family wanted to live in a bungalow year round, the lack of running water and heating facilities would make it impracticable. In addition to the summer homes, the property includes a clubhouse, a barn for lawn care equipment, a chapel and a grotto. Recreational facilities include a tennis court, playground, shuffleboard court and a swimming area. Defendant has a liquor license.

Defendant is organized as a non-profit organization, and its membership is comprised of annual, associate and social members. Annual members are those members who own bungalows and vote on all matters affecting the organization. The annual members own the land collectively. Pursuant to a leasehold agreement, defendant leases bungalow lots to the annual members for an annual fee. Annual members must be members

in good standing of the Roman Catholic Church.[1] Associate members are adults over age 21 who live in the bungalows throughout the summer, but are not annual members. These individuals are generally the immediate family of annual members. Social members are close friends and relatives of annual members who do not occupy bungalows throughout the summer. Neither associate members nor social members are required to be Roman Catholic.

Defendant is not formally affiliated with the Roman Catholic Church, nor with any Catholic organization. Prior to 1987, the "purpose" section of defendant's by-laws did not mention Catholicism or affiliation with the Roman Catholic Church. As laid out in the original charter:

> The purpose for which the corporation is formed is the maintenance of a Club for social enjoyments, in order to cultivate cordial relations and sentiments of friendship among its members and provide accommodations for social intercourse, outdoor sport, and healthful recreation for them.

Notwithstanding the lack of formal ties between the Church and defendant, many of its members are practicing Catholics. In 1922, the Archbishop of Philadelphia granted the club special permission for the celebration of mass on the club grounds each Sunday and provided a priest from a nearby town for such services. Some members conduct the rosary each night in the chapel. A statue of the Virgin Mary stands in the grotto near the entrance to the club.

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1. Until amendment of the by-laws in 1987, the club restricted annual membership to men.

Defendant follows a formal procedure in admitting new members to the community. Since the 1987 amendments to the by-laws, the membership applications must be accompanied by a written recommendation from the applicant's parish priest stating that the applicant is a practicing Roman Catholic in good standing. The full Board, by majority vote, makes the final decision on the admission of new members. There have been thirty-one transfers of ownership interests in bungalows since 1970. Since 1968, only four applicants have not been approved for annual membership.

II.

This lawsuit stems from the efforts of associate member Anita Gualtieri to become an annual member. Mrs. Gualtieri first applied for membership in 1986 so that she could purchase from her mother the leasehold on the bungalow that her family had held since the 1950's.[2] She was informed that she was not eligible for annual membership because she was a woman. Her husband was also ineligible for annual membership because he was not a member of the Roman Catholic Church. Failing to have the eligibility requirements amended, Mrs. Gualtieri wrote to the Cardinal's Commission on Human Relations and Urban Ministry to complain of defendant's discriminatory practices. After an investigation, the Archdiocese informed defendant that the allegations were not unwarranted and

2. Mrs. Gualtieri's mother inherited her deceased husband's leasehold and quasi-proprietary interest in their bungalow. As a widow, she was given all the rights under the leasehold except annual membership in the club since at that time annual membership was restricted to males.

threatened to withdraw permission to hold mass at the club. Subsequently, defendant revised its by-laws to make them gender-neutral, but did not alter the requirement that annual members be Roman Catholic. Rather, language was added to the purpose section emphasizing the religious aspects of the community's life and adding the requirement of a written statement from the parish priest attesting to an applicant's status as a member of the Roman Catholic Church.

Mrs. Gualtieri reapplied for annual membership in 1987. The Board of Governors considered and voted against her application based allegedly on the family's prior demonstrated lack of ability to get along with the community and lack of interest in the religious aspects of the community.

Mrs. Gualtieri notified the Civil Rights Division of the Department of Justice of defendant's policies, and it subsequently filed suit, alleging a pattern and practice of discrimination in the sale of dwellings, on account of religion and sex, in violation of the Fair Housing Act. After a hearing on the parties' cross-motions for summary judgment, the district court held that defendant was exempt from the Act under both the religious organization and private club exemptions. The court granted defendant's motion for summary judgment on the religious discrimination claim. The court went on to deny both parties' motions for summary judgment on the sex discrimination claim because there was a disputed issue of material fact. The government filed a motion for reconsideration, noting that if the private club exemption applied, it would bar both the sex and religious discrimination claims. The district court subsequently granted the motion and then dismissed the action in its entirety with prejudice.

The government filed a timely notice of appeal. This court exercises plenary review over the grant of summary judgment. *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 398 (3d Cir. 1990). Viewing the record in the light most favorable to the government, we may affirm only if there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The parties do not assert that there are material issues of fact. Therefore, our task is to determine whether the "evidence ... is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52.

III.

FAIR HOUSING ACT

The government alleges that defendant's policy and practice of prohibiting the sale of bungalows to non-Catholics violates the Fair Housing Act. That Act makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (1988). Defendant does not deny that it discriminates on the basis of religion; rather, it contends that the bungalows are not "dwellings" because they are not capable of being occupied as year-round residences. Thus, defendant asserts that the Fair Housing Act does not apply to it.

This court exercises plenary review over questions of statutory construction. *Chrysler Credit Corp. v. First Nat'l Bank and Trust Co.*, 746 F.2d 200, 202 (3d Cir. 1984). Furthermore, "[t]o the extent that we review the application of the law to

the facts, our review is plenary." *United States v. Lansdowne Swim Club*, 894 F.2d 83, 85 (3d Cir. 1990); *see also Petrella v. Kashlan*, 826 F.2d 1340, 1343 (3d Cir. 1987); *United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir.) *cert. denied*, 474 U.S. 906 (1985).

This court must first determine whether defendant's bungalows are dwellings. The Fair Housing Act defines "dwelling" to mean:

> any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. § 3602(b) (1988). Although the meaning of the word "residence" is central to understanding this definition, the Act provides no statutory definition of that term. In such cases, "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'" *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 195 (1985)).

In *United States v. Hughes Memorial Home*, 396 F.Supp. 544, 549 (W.D. Va. 1979), the court followed this rule of statutory construction and concluded that Title VIII applied to a children's home. In reaching that conclusion, the court applied the definition in Webster's Third New International Dictionary which provides that a residence is:

> a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.

Id.

Other courts that have looked at the issue of temporary residence have agreed with *Hughes Memorial. See Patel v. Holly House Motels*, 483 F.Supp. 374, 381 (S.D. Ala. 1979) (a motel is not a dwelling because it is not used for occupancy as a residence, but rather provides lodgings to transient guests); *Baxter v. City of Belleville*, 720 F.Supp. 720, 731 (S.D. Ill. 1989) (facility for AIDS victims is a dwelling because persons "will not be living there as mere transients"); *see also*, R. Schwemm, *Housing Discrimination Law* 53 (1983) (Title VIII "would presumably cover...facilities whose occupants remain for more than a brief period of time and who view their rooms as a residence 'to return to.' "). We agree with these cases and hold that the central inquiry is whether the defendant's annual members intend to remain in the bungalows for any significant period of time and whether they view their bungalows as a place to return to.

Applying this standard to the undisputed facts, we conclude that the annual members are not "mere transients." In any year, annual members may spend up to five months in their bungalows. Furthermore, nearly all of the annual members return to their bungalows summer after summer. Indeed, in the last twenty years there have been only thirty-one transfers of ownership within the community of forty-six bungalows. Consequently, defendant's bungalows fall within the ordinary

meaning of "residence" and must be considered dwellings for purposes of the Fair Housing Act.

Finally, there is no indication in the statutory language that Congress intended to limit coverage of the Act to year-round places of abode and exempt seasonal dwellings. To recognize a distinction based on seasonal residency would, as the government contends, create a broad exception to the Act that would permit, for example, residents in a private development of summer homes to lawfully exclude blacks from owning, renting or occupying the homes. Therefore, we agree with the district court that the bungalows fall within the statutory definition of "dwelling" and that defendant is subject to the provisions of the Act.

IV.

STATUTORY EXEMPTIONS

Defendant asserts that even if the bungalows fall within the statutory definition of "dwelling," it is exempt from the Fair Housing Act under the exemptions provided by 42 U.S.C. § 3607(a) for religious organizations and private clubs. "Under general principles of statutory construction, '[o]ne who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception.'" *Mills Music, Inc., v. Snyder*, 469 U.S. 153, 188 n.20 (1985) (White, J., dissenting) (quoting 2A C. Sands, *Sutherland on Statutory Construction* § 47.11, at 145 (rev. 4th ed. 1984)); *see also United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967); *cf. United States v. Lansdowne Swim Club*, 894 F.2d 83, 85 (3d Cir. 1990) (burden on defendant to show entitlement to Title II private

club exemption); *Singleton v. Gendason*, 545 F.2d 1224, 1226 (9th Cir. 1976) (burden on defendants-appellees to show entitlement to Title VIII single-family exemption, 42 U.S.C. § 3603(b)(1)). Thus, defendant has the burden of proving that it falls within the statutory exemption provided for religious organizations or private clubs as a matter of law.

RELIGIOUS ORGANIZATION EXEMPTION

Defendant's first affirmative defense is that it is exempt from the Fair Housing Act under section 807(a)'s exemption for religious organizations. That exemption provides, in pertinent part that:

> Nothing in this subchapter shall prohibit a religious organization, association, or society, *or* any non-profit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

42 U.S.C. § 3607(a) (1988) (emphasis added). To fit into this exemption, defendant must prove that it is either: (1) a religious organization, or (2) a non-profit organization "operated, supervised or controlled by or in conjunction with" a religious organization.

The district court concluded and defendant does not dispute that it is not itself a "religious organization." The dispute centers instead upon whether defendant is "operated, supervised or

controlled by or in conjunction with" a religious organization.

The government argues that the quoted language implies a hierarchical relationship in which the non-profit entity is subordinate to the religious organization. At the very least, the government contends, there must be some direct affiliation between the religious organization and the other organization, as would be the case with a religious school, for example. This interpretation finds some support in the limited legislative history.[3] Senator Mondale, whose amendment to the 1968 Civil Rights Act was adopted by Congress to create Title VIII, stated: "There is an exemption to permit religious institutions *or schools, etc., affiliated with them*, to give preference in housing to persons of their own religion despite the Act." 114 Cong. Rec. 2273 (Feb. 6, 1968) (emphasis added).

As the government argues, the Catholic Church does not operate, supervise or control defendant. There is no formal or legal relationship between them. At the most, the Church approves of and supports defendant by permitting religious services to be conducted on the premises.

Defendant responds that it is "operated in conjunction with a religious organization" and is directly affiliated with the Catholic Archdiocese. In support of its response, defendant argues that the exemption for religious organizations should be read broadly, and that the undisputed facts

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3. Since the statute was enacted with only minimal changes from the way it was first introduced by Senator Dirksen on the floor of the Senate, its legislative history does not include the committee reports and other documents that usually accompany major legislation. *See Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 n. 29 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

demonstrate that defendant is entitled to the exemption as a matter of law.

Defendant contends that the broad language of the exemption and the common dictionary meaning of the words used indicate that the relationship between the religious organization and the non-profit organization may consist of anything ranging from a formal, highly structured, hierarchical relationship to an informal, loosely-structured relationship. Additionally, defendant asserts, the religious exemption reflects Congress's sensitivity to first amendment rights. Consequently, defendant argues, the exemption should be broadly construed to cover activity that is permitted, but not required, by the Church.

We cannot agree with defendant's contention that the exemption is to be read broadly. A unanimous Supreme Court mandated in *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205 (1972), a "generous construction" of the Fair Housing Act, *id.* at 212, in order to carry out a "policy that Congress considered to be of the highest priority." *Id.* at 211. *See also Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The logical corollary to such a construction, as well as the general rule of statutory interpretation, is to construe narrowly any exemptions to the Act. Such a narrow reading is also supported by the only case interpreting Title VIII's religious exemption that we have found. *See United States v. Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D.Va. 1975) ("In view of the Supreme Court's holding that the Fair Housing Act must be accorded a generous construction, the general principle requiring the strict reading of exemptions from the

Act applies here with even greater force.") (citation omitted).

In holding that defendant fell within the exemption for religious organizations, the district court relied upon the defendant's affiliation with the Church as evidenced by the Church's grant of the privilege of having weekly mass celebrated on the grounds and its tacit approval of the recital of the rosary. In reaching its conclusion, the district court found that the Catholic Church does not actually "control" the club or its operations. The district court did state, however, that "the persons who, over the years, have operated and controlled the club, have done so 'in conjunction with' their continuing obligations as members of the Roman Catholic faith," and went on to conclude that "[a]s a practical matter, by virtue of its ability to grant or withhold the privilege of holding religious services in the club chapel...the Archdiocese does possess a very significant degree of control over the club itself." *United States v. Columbus Country Club*, No. 87-8164, slip op. at 10-11 (E.D.Pa. 1989).

We do not think that these undisputed facts are sufficient to hold that defendant carried its burden. The critical words of the exemption are "in conjunction with," and so there must be a mutual relationship between the non-profit society and a religious organization. The existence of this relationship cannot depend solely on the activities of the non-profit organization nor be viewed only from its perspective. Indeed, evidence of the club's unilateral activities would go to whether it is itself a religious organization not to whether it is operated "in conjunction with" a religious organization. Furthermore, the Church's ability to withdraw permission to hold mass and the fact

that on one occasion it may have indirectly influenced the club's Board of Governors by threatening to do so are not enough. Without further evidence of interaction or involvement by the Church, we cannot conclude that as a matter of law the Church controlled the defendant or that the defendant was operated "in conjunction with" the Church. Consequently, on this record and in light of our unwillingness to read the statutory exemption broadly, we hold that the defendant failed to carry its burden of proving its entitlement to the religious organization exemption.

PRIVATE CLUB EXEMPTION

Defendant's second affirmative defense is that it falls within the exemption for private clubs, as the district court held. Again, the defendant has the burden of proving its entitlement to this statutory exemption.

The Fair Housing Act states in pertinent part:

> Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides *lodgings* which it owns or operates for other than a commercial purpose, from *limiting the rental or occupancy* of such *lodgings* to its members or from giving preference to its members.

42 U.S.C. § 3607(a) (1988) (emphasis added). We believe that to fall within this statutory exemption five conditions must be met. The defendant must: (1) be a "private club not in fact open to the public"; (2) provide "lodgings;" and (3) only limit the "rental or occupancy of such lodgings." Furthermore, if a defendant provides "lodgings," those lodgings must be: (4) provided "as an

incident to its [defendant's] primary purpose or purposes;" and (5) owned or operated "for other than a commercial purpose." We do not address the district court's determination that the defendant was a private club satisfying condition (1) because we are content that our conclusions with respect to conditions (2) and (3) are fully dispositive.

To determine whether defendant's bungalows satisfy condition (2), we begin, as we must, by examining the statutory text. *See Mills Music, Inc., v. Snyder*, 469 U.S. 153, 164 (1985). Since the private club exemption is part of the same section that provides the exemption for religious organizations, it is instructive to note the differences. In the first place, the word "lodgings" has replaced the word "dwellings," and the word "sale" has been deleted. Furthermore, the private club exemption requires that the club provide lodgings only "as an incident to its primary purpose or purposes." Thus, the overall effect of these changes is to carefully limit the exemption.

Congress' intention to limit the exemption is borne out by the legislative history.[4] Senator

4. The private club exemption was introduced in Senator Dirksen's amendment to his own substitute bill. The original wording was:

> Nor shall anything in this title prohibit a bona fide private club from limiting the *sale*, rental, or occupancy of *dwellings* which it owns or operates for other than a commercial purpose to members of the club or from giving preference to such members.

114 Cong. Rec. 4690 (Feb. 29, 1968) (emphasis added). Senator Kuchel subsequently introduced an amendment that substituted the word "lodgings" for "dwellings," deleted the word "sale," and added the language "as an incident to its primary purpose or purposes." 114 Cong. Rec. 5526 (Mar. 6, 1968).

Kuchel, the sponsor of the amendment that modified the wording of the exemption, explained that the purpose of the changes was: "to tighten the exemption now provided in the substitute referring to bona fide private clubs." 114 Cong. Rec. 5526 (Mar. 6, 1968).

Defendant argues that it provides "lodgings," because according to the dictionary, a lodging is a "dwelling," and Congress drew no durational distinction between the two terms, as it did in Title II when it modified "lodging" with the words "to transient guests."[5] This indicates, defendant contends, that the word lodging by itself does not connote occupancy of limited duration and therefore the terms "lodging" and "dwelling" should be considered interchangeable.

The government responds that defendant does not provide "lodgings" because its bungalows are "dwellings" in the sense of summer residences, not temporary accommodations as Congress intended.

Although the district court recognized that a distinction might be drawn between "dwelling" and "lodging" on the basis of the duration of contemplated occupancy, it did not agree that Congress intended this distinction to have any significance. We do not think that this conclusion comports with Congress' deliberate substitution of the word "lodging" for "dwelling" and the plain statement of intent repeatedly expressed by Senator Kuchel, the amendment's sponsor, that the language modifications were designed "to tighten [Senator Dirksen's] amendment as much

5. Section 2000a of Title II prohibits discrimination in places of public accommodation. 42 U.S.C. § 2000a (1988). A place of public accommodation is defined in part as: "any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ." 42 U.S.C. § 2000a(b)(1) (1988).

as possible to avoid possible abuse." 114 Cong. Rec. 5526 (Mar. 6, 1968). Therefore, we conclude that defendant has not shown that it provides "lodgings" as required by condition (2) of the private club exemption.

The government also argues that the defendant fails to satisfy condition (3) because the private club exemption, by its express terms, applies only to the "rental or occupancy" of lodgings, not to their sale. Thus, the government claims that even if defendant were found to meet all the other conditions of the private club exemption, it cannot protect the discriminatory sale of dwellings by its annual members. Again, the government asserts that this interpretation is borne out by the legislative history which indicates that the word "sale" was deleted at the same time that the word "lodging" was substituted for "dwelling."

At oral argument, defendant responded to the government's argument, contending that it meets the "rental or occupancy" requirement. Defendant's argument is that by limiting the sale of the bungalows to Catholics, the club is limiting the occupancy of the bungalows and the rental of the ground on which the bungalows sit. So, defendant argues, the club is "in effect" limiting the occupancy and rental of lodgings.

Although the district court noted the government's argument, it did not address the government's position. We believe that the plain language of the exemption and the legislative history of the Act exempt only the "rental or occupancy" of lodgings, not their sale. So, even though limiting the sale of bungalows to Catholics might have the effect of limiting the rental or occupancy of lodgings, we conclude that

defendant's policy and practice of discriminating against persons in the sale of bungalows falls outside the plain language of the private club exemption.

We conclude that defendant has failed to show that the bungalows are lodgings and that its restrictions upon the sale of bungalows are merely limits on "rental or occupancy." Therefore, we conclude that as a matter of law defendant has not met its burden of proving that it falls within Title VIII's limited statutory exemption for private clubs.

Defendant also argues that application of the Fair Housing Act violates the free exercise and establishment clauses of the first amendment as well as the defendant's first amendment right to free association. Because the district court did not address those arguments, we will not do so either, preferring to have the district court consider them in the first instance.

V.

We are satisfied that the record does not, as a matter of law, support summary judgment for defendant on either of its affirmative defenses. We will, therefore, reverse the orders of the district court ruling that defendant meets the religious organization and private club exemptions of the Fair Housing Act and dismissing the government's claim against the Columbus Country Club and remand for further proceedings.

MANSMANN, *Circuit Judge*, dissenting.

I dissent because I believe that the panel majority, in construing the religious exemption from the Fair Housing Act, unduly minimizes significant connections between the Columbus Country Club and the Catholic Church. By insisting that a formal hierarchial relationship be established between the Church and the Club before the exemption may be invoked, the majority reaches a result which, in my view, was not anticipated by those drafting the Fair Housing Act. The narrow construction of the exemption has potentially significant implications for those wishing sincerely to live and associate in religious community.

It is important to note, at the outset, that this case is the first since the enactment of the Fair Housing Act in 1968 to construe the Act's religious exemption provision.[1] This has not been a fertile ground for litigation and I believe that our analysis should reflect that fact, by being firmly grounded in the statutory language and the facts of this case.

I.

In order to assess the majority's conclusions regarding the inapplicability of the religious exemption, I must detail the history and dimension of Columbus Country Club's connection with the Roman Catholic Church. It is against this background that the statutory exemption must be evaluated.

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1. While the panel majority cites *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975) as having interpreted Title VIII's religious exemption, that court did not address the exemption substantively as it determined, initially, that the exemption was totally inapplicable to the facts presented.

The Columbus Country Club was organized in 1920 by the Knights of Columbus, a Roman Catholic men's organization. In 1922, while members were still required to belong to the Knights of Columbus, title to the land was taken in the name of a separate non-profit corporation. In 1924, the Club was given its current name and, in 1936, the Club eliminated the requirement that members be affiliated with the Knights of Columbus; membership continued to be limited to Catholic males.[2]

As the majority points out, the Club's annual members are required to be members in good standing of the Roman Catholic Church. Prospective annual members are required to obtain the endorsement of an annual member and complete a one-page application form containing, among other things, the name of the prospective purchaser's parish. The applicant must demonstrate that he or she, too, is a practicing Roman Catholic in good standing with his or her parish church; a statement to this effect from the parish priest must accompany the application.[3]

The Club contends that, from its inception, religious expression has been an integral feature of the Club community. When the Club opened, the grounds were dedicated in a special ceremony led by the organization's spiritual director and two

2. By an amendment to the bylaws made in 1987, women were permitted membership. The requirement that members be members of the Catholic faith was retained.

3. The Club's uncontroverted contention is that evidence of common interest in the religious activities of the Club and the parish priest's attestation to the applicant's good standing in that parish have always been membership requirements. While these requirements were always observed, they were not codified in the Club Bylaws until 1987.

priests. During the period from 1920-1922, a special mass was celebrated each Sunday in the local parish for the benefit of Club members.

In 1922, and for the succeeding sixty-eight years, the Archbishop of Philadelphia has granted the Club special permission to have mass celebrated in a chapel on the Club grounds on each Sunday of the summer season. The Catholic Archdiocese of Philadelphia provides the Club with the services of a priest who celebrates the weekly mass and leads other special religious ceremonies observed by the Club members.

Family members meet in the chapel each summer evening to pray the rosary and a consecrated statue of the Blessed Mother stands in an area of the grounds known as the "grotto." Both the chapel and the grotto are maintained by club members and the Sunday offering taken in the chapel is remitted to the local parish.

The affidavit of Reverend Richard J. Fleming, pastor of the parish in which the Club is located, was appended to the Club's motion for summary judgment. That affidavit states that because Columbus Country Club, "a community of Roman Catholic families who live, pray, and worship together through the summer months . . . is a Roman Catholic organization, the Archdiocese of Philadelphia provides it with the special privilege of celebrating mass on its grounds. This is a very rare and unusual privilege." The affidavit also establishes that a parish priest celebrates mass at the Club on the Fourth of July and on August 15, a holy day of obligation. Club families take an active role in celebration of the Mass which, each week, is said in honor of the deceased members of a particular Club family.

The same affidavit notes that the statue of the Blessed Mother on Club grounds was consecrated by a priest in a special ceremony for the benefit of Club families and the Club is in the process of applying for the special privilege of having the chapel named in honor of a woman soon to be canonized a saint.

Church doctrine recognizes the value of the assembly of a community of believers as an integral facet of the practice of Catholicism. Furthermore, the affidavit states that "the Roman Catholic church recognizes and approves of the assembly of a group of Roman Catholic families for a summer retreat of weekly worship and daily prayer together as a valuable and legitimate exercise of their religious beliefs."

II.

Congress drafted the religious organization exemption broadly to apply to any "religious organization, association, or society or any non-profit institution or organization operated, supervised or controlled by or in conjunction with a religious organization. . . ." 42 U.S.C. § 3607(a) (1988). Given the use of the disjunctive form here, the Club argues that Congress intended that the statutory exemption apply to any non-profit organization that is "operated by" or "supervised by" or "controlled by" or "operated in conjunction with" or "controlled in conjunction with" a religious organization. The district court found that, at the very least, the Club operated in conjunction with the Roman Catholic Church, and was, therefore, entitled to the Act's religious exemption:

> [A]lthough, as a strictly legal proposition, the Roman Catholic Archdiocese does not actually "control" the club or its operations, it is clear that

> the persons who, over the years, have operated and controlled the club have do so "in conjunction with" their continuing obligations as members of the Roman Catholic faith. As a practical matter, by virtue of its ability to grant or withhold the privilege of holding services in the Club chapel – a privilege which is central to the traditional operations of the club – the Archdiocese does possess a very significant degree of control over the club itself.

United States v. Columbus Country Club, No. 87-8164, slip op. at 10-11 (E.D. Pa. 1989).

The majority, evaluating all of the undisputed facts detailed above and the district court's conclusion, concludes, surprisingly to me, that the Country Club has not carried the burden of establishing entitlement to the religious organization exemption. According to the majority, the words "in conjunction with" imply a "mutual relationship between a non-profit society and a religious organization. The existence of this relationship cannot depend solely on the activities of the non-profit organization nor be viewed only from its perspective." Majority typescript at 15. The majority concludes that "[w]ithout further evidence of interaction or involvement by the Church, we cannot conclude that as a matter of law the Church controlled the defendant or that the defendant was operated 'in conjunction with' the Church." *Id.*

This result is not compelled by the text of the exemption itself. The language of the exemption does not focus solely upon "control" or "mutuality" but describes a number of different types of relationships which serve to bring an organization within the terms of the exemption. The majority's

reliance on equivocal legislative history notwithstanding, I think it clear that the Columbus Country Club, under the terms of the statute itself, qualifies for the religious organization exemption. If Congress had meant to make control or mutuality the determinative evaluative criterion, it certainly would have expressed this intention more clearly. The exemption here must be interpreted at least as broadly as the common meaning of its text, rather than restricted to circumstances far more narrow than the meaning conveys. *See Caminetti v. United States*, 242 U.S. 470, 485-486 (1917)(words used in a statute are presumed, unless the contrary appears, to be used in their ordinary and usual sense and with the meaning commonly attributed to them.) The majority approach simply is not supported by the plain language of the exemption.

III.

Even if a mutuality standard were clearly expressed in the text of the exemption, I would find that that standard has been met. In examining the history of Columbus Country Club and, the *uncontroverted* details of its connections to the Catholic church, I find it difficult to imagine what more the panel majority could want in terms of mutuality. The Club has operated to support the Church, both monetarily and by its members' living and practicing the tenets of the Roman Catholic faith. The Church, in turn, has supported the Club, by participating in its founding, by providing prayer support and by making clergy available to the community where it does not do so in other cases; the Church's provision of a priest to conduct services is central to the Club's purpose and philosophy and, as the district court

concluded, certainly provides the Church with a substantial measure of *de facto* control over Club operations. The Church has, in fact, exercised its influence over the Club in bringing it into compliance with the Church's policy against sex discrimination.

Throughout this litigation, the government has taken the position, which the majority apparently accepts, that the Columbus Country Club is nothing more than a homeowner's association whose "one link" to the Church – the weekly mass – is not sufficient to support exemption from the Fair Housing Act. In the government's view – again tacitly adopted by the majority – the extremely narrow interpretation of the exemption's phrase "in conjunction with" is appropriate. Otherwise, the argument goes, any group of persons holding the same religious beliefs could exclude others from their housing development simply by calling themselves a religious organization and arranging for a local church to hold certain services on the development's grounds.

Where the legislative history underlying this exemption is, by the majority's admission, scant, there is no guiding caselaw, and the wording of the exemption itself is quite broad, I think it inadvisable to read into the exemption a requirement of formality that is not clearly expressed. This is especially so given the first amendment implications of this case.

I conclude that the uncontroverted record does *not* support the conclusion that the Club is nothing more than a homeowner's association bent on excluding non-Catholics. The religious dimension of this Club is substantial and does not, as the parties agree, represent a subterfuge to

evade the requirements of the Fair Housing Act. The Club's organization and religious character preceded enactment of the Fair Housing Act by more than 48 years and there is not the slightest indication of bad faith in the Club's having limited its annual membership to those of the Catholic faith. Subjecting the Club to the Fair Housing Act will destroy its character as a religious community where like-minded individuals are able to support one another, communally express their beliefs and model their values to their children. I cannot believe that this was the kind of "wrong" which the Fair Housing Act was drafted to remedy. From a policy viewpoint, the conclusion reached by the majority here today may have far-reaching impact on groups such as church camps, retreats and other organizations through which individuals associate to practice their faith.

While another case, presenting different facts, may require another result, here I believe that the district court's conclusion that the Club is exempt from allegations of religious discrimination under the Fair Housing Act is correct and should be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
v.	:	
COLUMBUS COUNTRY CLUB	:	No. 87-8164

MEMORANDUM AND ORDER

DECEMBER , 1989

FULLAM, Ch.J.

The Fair Housing Act renders it unlawful "to refuse to sell or rent . . . or otherwise make unavailable or deny a dwelling to any person because of . . . religion or sex." 42 U.S.C. § 3604(a). The government has brought this action against Columbus Country Club, asserting that the club is in violation of this statute in both respects, *i.e.*, that it discriminates on the basis of both religion and sex, in determining who may and who may not lease space for a summer home on the club's property in Bensalem Township, Bucks County, Pennsylvania. Both sides have moved for summary judgment.

In the early days of this century, three separate councils of the Knights of Columbus joined forces to acquire and improve a 23-acre tract of land along the Delaware River north of Philadelphia, in Bensalem Township. Title to the tract was taken in the name of a separate non-profit corporation, the "Tri-Council of the Knights of Columbus." The purpose was to enable members of the Knights of Columbus and their families to escape the discomforts of city life during hot weather.

The site was eventually improved with a club house, a chapel, a grotto, and various recreational facilities related to swimming, ball-playing, etc. Members were permitted to occupy small lots on the club grounds, and to erect, at their own expense, summer cottages, in exchange for an annual payment.

The project encountered financial difficulties. In 1922, in order to resolve these difficulties, a group of the members reorganized the project, contributed money to salvage the project, and amended the corporate charter by changing the name and eliminating the requirement of affiliation with the Knights of Columbus. The successor entity was the defendant Columbus Country Club, which since 1922, has owned and operated the project. Membership in the Knights of Columbus had been limited to male Roman catholics, and membership in the Columbus Country Club was similarly restricted.

Only the annual members were entitled to have summer cabins on the premises. The club owned the land, but the annual members owned their cottages. Cottages could be sold, but only with the consent of the club. When a member died, his widow could continue to occupy the cottage, but could not become a member; membership usually passed to a son, or some other male relative of the deceased.

Until 1987, all of the foregoing restrictions upon annual membership and the right to lease space for a cottage were in effect. Shortly before the Complaint was filed, but allegedly not in response to the prospective lawsuit, the club changed its by-laws so as to eliminate the males-only restriction. But the privilege of annual membership is still limited to members of the Roman Catholic faith in good standing.

In addition to the annual members, the club has associate members and social members. Although non-Catholics may become associate or social members, persons in those classifications tend to be related to or close friends of the annual members and their families. It is estimated that only about 20 percent of these associate and social members are non-Catholic.

From the beginning, the facility has enjoyed a special relationship with the Roman Catholic Archdiocese of Philadelphia, in that the Archdiocese has extended the privilege of conducting religious services (the celebration of Mass on Sundays) in the club's chapel.

Throughout the summer, weekly religious services are conducted by a visiting priest from a nearby parish. In addition, there is a grotto at the entrance to the grounds, containing statuary of religious significance.

The club is non-profit. It derives its financial support from membership dues, together with the relatively modest profits derived from the clubhouse bar, which has a club liquor license. Annual members are expected to mow the grass in the immediate vicinity of their cottages; the remainder of the grounds, including the chapel and grotto, are maintained by the cooperative efforts of the members and their families.

I. DISCRIMINATION BASED ON SEX

When member Clement Mossup died in 1979, the leasehold interest in the small portion of the club property on which the family's summer cabin was located passed to his widow, but she was not permitted to become an annual member herself because of the provision in the club's by-laws restricting membership to males. It was the family's desire to transfer the leasehold interest to the Mossups' daughter, Anita Gualtieri, and/or her husband. Transfer to the daughter proved impossible because she was not a male, and transfer to the daughter's husband proved impossible because, although male, he was not a Catholic. Ms. Mossup and the Gualtieris continually requested the club to change, or grant an exception from, the restrictive provisions of the by-laws, but they received no response from the club.

Eventually, Anita Gualtieri complained to the Archdiocese. This produced a letter of warning to the club from a representative of the Cardinal's commission on Human Relations and Urban Ministry, threatening to recommend withdrawal of privileges — *i.e.*, permission to hold church services in the chapel and the services of a priest to conduct such services.

On August 30, 1987, the club amended its by-laws to permit women, as well as men, to become annual

members. In October of that year, the Justice Department notified the club of its intention to file this lawsuit, based upon its investigation of Mrs. Gualtieri's complaints, which had first been presented to the Civil Rights Division of the Justice Department in May of 1987. There is a disputed issue of fact as to whether the club had been made aware of Mrs. Gualtieri's complaints, or that the Justice Department was investigating the matter, and as to precisely what prompted the by-laws change — the prospect of a lawsuit, pressure from the Archdiocese, independent recognition by the club that the change was desirable, or a combination of these factors.

Notwithstanding the change in the by-laws, the club refuses to admit either Mrs. Gualtieri or her husband to membership. The husband continues to be ineligible because he is not a Roman Catholic. There is a disputed issue of fact as to why Anita Gualtieri is being denied membership: retaliation against her for complaining about discrimination, or legitimate reasons based upon personality and conduct unrelated to her complaints about discrimination.

In view of the factual disputes identified above, neither party is entitled to summary judgment on the sex discrimination issues. Although the club's by-laws are now in conformity with the requirements of the Fair Housing Act, it will be necessary to resolve disputed factual issues at trial to determine whether the real-world actions of the club conform to the statutory requirements, and whether past violations have been fully remedied.

II. DISCRIMINATION BASED UPON RELIGION

The defendant undoubtedly discriminates on the basis of religion. The question is whether the defendant violates the Fair Housing Act. Defendant contends that the statute has no application to the defendant's activities because the summer cottages here in question do

not constitute "dwellings" within the meaning of the statute. Alternatively, the defendant argues that, if the Act does apply, the defendant falls within either or both of the two statutory exceptions for religious organizations and private clubs. Finally, the defendant asserts that if the statute is properly interpreted as prohibiting defendant's discriminatory activities, its application to the defendant is unconstitutional.

As noted at the outset, it is a violation of the statute to "make unavailable or deny a dwelling to any person because of . . . religion." Contrary to defendant's argument, I am satisfied that the summer cottages here involved fit comfortably within the statutory definition of "dwelling", *viz.*:

> "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and *any vacant land which is offered* for sale or *lease for the construction or location thereon of any such building,* structure or portion thereof." 42 U.S.C. § 3602(b) (emphasis added).

The cottages plainly are used as places of abode. Club members and their families live there in the summertime. The statute is not limited to principal dwellings, or year-round abodes. And there can be no serious question about the fact that the defendant restricts the availability of such dwelling's — in terms of leasing the underlying lot, and owning the cottage — to members of the Roman Catholic faith. I therefore conclude that the Act does have potential application to defendant's activities; the more difficult issue is whether one of the exceptions fits the defendant's circumstances.

Section 807 of the statute, 42 U.S.C. § 3607, provides:

> "Nothing in this subchapter shall prohibit a religious organization, association, or society, or any non-profit institution or organization operated,

> supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members."

Congress has thus established two separate — but, in the circumstances of this case, somewhat overlapping and related — exceptions from the Act's prohibitions: religious organizations and non-profit institutions associated with religious organizations may limit the sale or rental of dwellings owned and operated for non-commercial purposes to members of that particular religion; and a private club "which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose" may discriminate in the rental or occupancy of "such lodgings".

The Government contends that the defendant does not qualify under either approach. The exemption for religious organizations is inapplicable, says the government, because the defendant is neither a "religious organization, association or society", nor is it "operated, supervised or controlled by or in conjunction with a religious organization, association or society". And the defendant does not qualify under the private club exemption because it is not a private club, the bungalows are not "lodgings", the bungalows are not merely

"rented" or "occupied", by members, but are permanently owned; and, in any event, making the summer cottages available is the primary purpose of the club, and not merely "incident to its primary purpose or purposes".

Analysis begins with the observation that the exemption for religious organizations applies to "dwellings" and the exemption for private clubs extends to "lodgings". The statute provides a definition of "dwelling", but does not define "lodgings". The government argues that this case involves dwellings but not lodgings, the defendant argues the converse proposition.

Webster's Third New International Dictionary defines "lodging" as "a place to live; DWELLING", but also includes subsidiary definitions which suggest that the term "lodging" generally connotes one or more rooms in a building, rather than the entire building, and generally connotes rental rather than ownership, and perhaps short-term rather than permanent occupancy.

The statutory definition of "dwelling", set forth above, is very broad. Since it includes portions of buildings, intended for residence by families, and since the statute elsewhere defines "family" to include any one person, the circle is complete: dwellings include lodgings.

In the context in which the two terms are used in this statute, it is probable that, if we are to make any distinction at all between the two terms, it should relate to the duration of contemplated occupancy. Congress may well have assumed that it would be unlikely for a religious organization to impose a religious qualification except in conjunction with fairly permanent residence, and that occupancy of living quarters incidental to the primary purpose of a private club would usually be only temporary. On the other hand, when the dictionary prominently lists "dwelling" as a synonym for "lodging" and when the language of the statute does not expressly draw any durational distinction between the two terms, I am disinclined to attribute decisive significance to durational connotations.

I conclude, therefore, that the key issues are whether the defendant qualifies as an organization which is adequately associated with a religious organization for purposes of the exemption relating to religious organizations, and whether the occupancy of summer cottages by club members is "incident to" the primary purpose of the club.

In analyzing the applicability of the exemption for religious organizations, it must be conceded that the defendant club is not itself a religious organization, even though its annual membership is limited to members of the Roman Catholic faith. If an organization could qualify as "religious" for purposes of this exemption merely by limiting its membership on religious lines, would-be discriminators could act with impunity. It must be remembered, however, that the club premises include a chapel which is dedicated to use by a particular religious sect; that prayer services are held regularly; that the members maintain both the chapel and the grotto — a task which would seem unlikely to attract the services of putative non-Catholic members; and that for nearly 70 years, the relationship between the club and the Roman Catholic Archdiocese of Philadelphia has included the privilege of having priests from a nearby parish celebrate Sunday masses in the club chapel every Sunday throughout the club's season. And, although, as a strictly legal proposition, the Roman Catholic Archdiocese does not actually "control" the club or its operations, it is clear that the persons who, over the years, have operated and controlled the club, have done so "in conjunction with" their continuing obligations as members of the Roman Catholic faith. As a practical matter, by virtue of its ability to grant or withhold the privilege of holding religious services in the club chapel — a privilege which is central to the traditional operations of the club — the Archdiocese does possess a very significant degree of control over the club itself.

With respect to the exemption for private clubs, there is no doubt that the defendant is indeed a private,

non-profit, club. By granting the annual members the right to occupy their respective lots, and to maintain their summer cottages thereon, I believe the club is providing "lodgings", as discussed above. The key issue is whether this is done "as an incident to its primary purpose or purposes".

The club's charter states its purpose as "establish and maintain a Country Club with accommodations for social enjoyment, outdoor sport, and healthful recreation". The official history of the club, issued long before the Fair Housing Act was passed, characterizes the club as a "Catholic organization" and as a " Vacation Group". The statute does not contain a definition of "primary purpose or purposes", nor does it define "as an incident to".

It can be said that the club's principal purposes are social, as evidenced by its club house activities, the club liquor license, and the theme of summer vacations shared by close friends and relatives; or perhaps recreational, as evidenced by the swimming facilities, ball-playing activities, etc. Perhaps it can also be said that a principal purpose is to make available the dwellings or lodgings occupied by the members during the summer.

The government's argument proceeds on the assumption that if the latter interpretation of the club's primary purpose — *i.e.*, providing the space for summer cottages — is the correct choice, then the statutory exemption is not available, since this would be the primary purpose, rather than "incident to" that primary purpose. Strictly speaking, however, this does not necessarily follow: according to the dictionary, "incident", in its non-noun usage, connotes a causal relationship or a customary association, and is not limited to a subordinate or casual relationship. In other words, even if providing space for summer cottages is a principal purpose of the defendant club, its provision of "lodgings" for annual members comes about as a consequence of, and is logically and normally associated with, that primary purpose.

I am constrained to conclude, therefore, that Congress used the "incident to" language to make clear that private clubs are not free to discriminate in matters unrelated to their main purpose. Under that interpretation, the defendant plainly qualifies for the exemption.

The foregoing analyses are subject to the valid criticism that they rely too heavily upon detailed parsing of the words used in the statute. The real task confronting the court is to ascertain, and implement, the true intent of Congress. While there may be some lingering doubt as to whether, in the course of the preceding analyses, I have in every instance hit upon the correct choice among the various possible dictionary definitions of terms, I have no hesitation in stating that, based upon my review of the evidence in this case and the history of the defendant and its practices, I am persuaded that Congress did not intend to prohibit religion-based discrimination in these circumstances.

In view of the conclusions thus far expressed, I need not address defendant's constitutional arguments. Defendant's motion for summary judgment will be granted insofar as discrimination on the basis of religion is concerned. The sex discrimination issues remain for trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
v.	:	
COLUMBUS COUNTRY CLUB	:	No. 87-8164

ORDER

AND NOW, this 6th day of December, it is ORDERED:

1. On all issues relating to discrimination on the basis of religion, defendant's motion for summary judgment is GRANTED, and judgment is entered in favor of the defendant.

2. On all issues relating to sex discrimination, the cross-motions of the parties are DENIED.

Ch.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

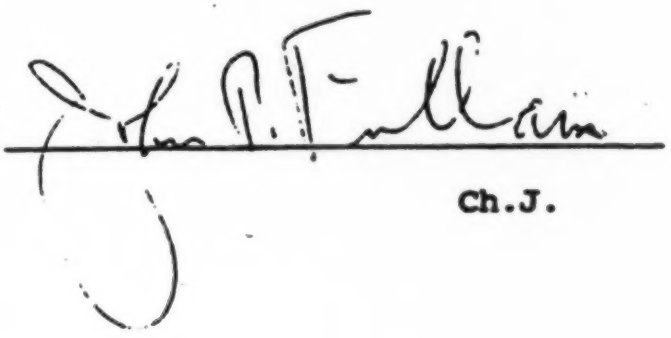
UNITED STATES OF AMERICA	:	CIVIL ACTION
V.	:	
COLUMBUS COUNTRY CLUB	:	No. 87-8164

ORDER

AND NOW, this 11th day of January, 1990, both parties having moved for reconsideration of this court's Order of December 7, 1989, which granted partial summary judgment in favor of the defendant; and both parties having now agreed that, in view of the court's conclusion that the defendant qualifies as a private club, there are no remaining claims by plaintiff which could survive that ruling, it is therefore ORDERED:

1. The motions for reconsideration are GRANTED.

2. This action is DISMISSED WITH PREJUDICE, in its entirety.



Supreme Court, U.S.
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No. 90-1465

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLUMBUS COUNTRY CLUB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fair Housing Act applies to the Columbus Country Club, a community of summer homes that requires homeowners to be members of the Roman Catholic Church.

2. Whether application of the Fair Housing Act to the Club violates the First Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A28) is reported at 915 F.2d 877. The decision and orders of the district court (Pet. App. A29-A40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1990. A petition for rehearing was denied on December 18, 1990. Pet. App. A1. The petition for a writ of certiorari was filed on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. Petitioner maintains a community of 46 summer homes, called bungalows, on a 23-acre tract of land along

[1] If petitioner's filing, which was styled a "Petition for Reargument in Banc," is deemed to be a suggestion for panel rehearing, it is out of time. See Sup. Ct. R. 13.4; *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1660-1662 (1990).

the Delaware River north of Philadelphia. Owners live in their bungalows only during the summer months. The property includes, in addition to the bungalows, a clubhouse, a barn for lawn care equipment, and a chapel. Petitioner's recreational facilities include a tennis court, playground, shuffleboard court, and a swimming area. Petitioner has a liquor license. Pet. App. A4.

Petitioner was organized in 1920 by the Knights of Columbus. In 1922, title to the land was conveyed to a separate non-profit corporation, which had as its stated purpose to "provide accommodations for social intercourse, outdoor sport, and healthful recreation" for members and their families. Pet. App. A4, A5. In 1924, the name of the organization was changed to the Columbus Country Club. In 1936, petitioner eliminated the requirement that members be affiliated with the Knights of Columbus, but continued to limit membership to Roman Catholic males. *Ibid.*

Petitioner is a non-profit organization that is owned and operated by 46 "annual members," one for each bungalow. The annual members own the land collectively; petitioner leases a bungalow lot to each annual member. C.A. App. 432-435. The lease agreement provides that each annual member shall improve the lot by building a bungalow, that petitioner has legal title to the bungalow, and that the annual member has a "quasi-proprietary interest" in the bungalow. *Id.* at 70, 432-433. Annual members may sell their interest in their bungalow, subject to certain conditions, to any person who qualifies as an annual member. *Id.* at 204-206, 433. Since 1970, there have been 31 transfers of ownership interests in bungalows; since 1968, four applicants have been rejected for annual membership. Pet. App. A4-A6, A30.

Prior to August 30, 1987, annual membership was limited to male Catholics. Widows of annual members could not become annual members, but were otherwise recognized as

bungalow owners. On August 30, 1987, petitioner revised its by-laws to permit women to become annual members, but did not alter the requirement that annual members be members of the Roman Catholic Church. Pet. App. A4-A6, A30, A31.

Petitioner also issues "associate" memberships and "social" memberships. An associate member may live in a bungalow and use the facilities on the grounds. A social member may use only the clubhouse. The current by-laws do not require either type of member to be male or Catholic.[2] Pet. App. A5.

Petitioner is not formally affiliated with the Roman Catholic Church or with any Catholic organization. Pet. App. A5. The Church did not order the formation of the Club or require that its members be Catholic. C.A. App. 68, 236-238, 247. Club documents, such as amendments to the by-laws, are not submitted to the Church for approval or review. *Id.* at 233. Prior to the August 1987 amendments, the "purpose" section of the petitioner's by-laws did not mention Catholicism or affiliation with the Catholic Church. Pet. App. A5.

In 1922, the Archbishop of Philadelphia granted special permission to celebrate masses at the Club each Sunday, and provided a priest from a nearby town for such services. In addition, some members say the rosary together in the evenings, and a statue of the Virgin Mary stands in an area near the entrance to the Club grounds known as the "grotto." Pet. App. A5, A30-A31.

2. This lawsuit stems from the efforts of Anita Gualtieri to become an annual member of the Club. Mrs. Gualtieri's father had been an annual member of the Club since the early 1950s. In due course, the family decided to transfer the property interest in the bungalow to Mrs. Gualtieri.

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[2] Prior to 1987, women were excluded from associate and social memberships. C.A. App. 421-422.

Because Mrs. Gualtieri was not a male, and her husband was not Catholic, neither was eligible for annual membership under the Club's by-laws. Pet. App. A6.

When Mrs. Gualtieri's inquiries into whether the Club would change its policies or grant an exception proved fruitless, she complained to the Archdiocese of Philadelphia. Her complaint focused on the Club's refusal to admit woman members. After an investigation, the Archdiocese sent a letter to the Club stating that the allegations were not unwarranted and threatening to withdraw permission to hold masses and the services of a priest. Pet. App. A6-A7, A31.

On August 30, 1987, petitioner revised its by-laws to make them gender-neutral. After the by-laws were amended, Mrs. Gualtieri again sought to become an annual member. The Board of Governors rejected her application. Pet. App. A6-A7.

3. In May 1987, Mrs. Gualtieri notified the Civil Rights Division of the United States Department of Justice of petitioner's membership policies. After an investigation, the United States filed suit against petitioner, alleging that it maintained a policy and practice of discriminating against persons in the sale or rental of dwellings, on account of religion and sex, in violation of the Fair Housing Act, 42 U.S.C. 3604.[3] Pet. App. A7.

The parties filed cross-motions for summary judgment. The district court initially declined to grant summary judgment on the sex discrimination claim or the claim that

[3] Section 804(a) of the Fair Housing Act prohibits the refusal to sell, rent, or otherwise make available dwellings on the basis of religion or sex. 42 U.S.C. 3604(a). Section 804(b) prohibits discrimination in the terms, conditions, or privileges of the sale or rental of dwellings on the basis of religion or sex. 42 U.S.C. 3604(b). Section 804(c) prohibits making statements with respect to the sale or rental of dwellings that indicate a preference, limitation, or discrimination based on religion or sex. 42 U.S.C. 3604(c).

Mrs. Guaitieri was denied membership in retaliation for complaining about discrimination. As to those claims, the court found that material facts were in dispute. As to the religious discrimination claim, however, the court concluded that petitioner was exempt from the Fair Housing Act under both the religious organization and private club exemptions of Section 807, 42 U.S.C. 3607.[4] Pet. App. A29-A39. The court held that, although the Club is not itself a religious organization, it is controlled by the Archdiocese of Philadelphia "[a]s a practical matter."[5] *Id.* at A36. In addition, the court held that petitioner met the private club exemption because it is private and provides "lodgings" "incident to" its primary purpose. *Id.* at A36-A38.

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[4] Section 807 (renumbered without substantive change as Section 807(a), 42 U.S.C. 3607(a), by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(d), 102 Stat. 1622-1623) provides:

> Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental, or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

[5] Contrary to petitioner's assertion (Pet. 7), the district court did not hold that the Club was operated "in conjunction with" the Roman Catholic Church. Rather, the court stated that "the persons who * * * have operated and controlled the club[ ] have done so 'in conjunction with' their continuing obligations as members of the Roman Catholic faith." Pet. App. A36.

Accordingly, the court granted the petitioner's motion for summary judgment on the religious discrimination claim. *Id.* at A39.

The United States filed a motion for reconsideration noting that the private club exemption, if it applies, exempts the Club from claims of sex discrimination as well as religious discrimination. Pet. App. A7. Upon reconsideration, the district court entered judgment for the petitioner. *Id.* at A7, A40.

4. The court of appeals reversed and remanded. Pet. App. A2-A28. As an initial matter, the court held that the bungalows are "dwellings" within the meaning of the Act. *Id.* at A8-A11. The Act defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence." 42 U.S.C. 3602(b). The court reasoned that, because annual members inhabit their bungalows for a significant period of time, they fall within the ordinary meaning of "residence." Pet. App. A10-A11. The court rejected the contention that the Fair Housing Act applies only to year-round residences. *Id.* at A11.

The court concluded that petitioner did not meet the religious organization exemption. Pet. App. A12-A16. The court observed that "defendant does not dispute that it is not itself a 'religious organization.'" *Id.* at A12. Thus, the relevant question is whether petitioner is "operated, supervised or controlled by or in conjunction with" a religious organization. *Id.* at A12-A13 (quoting 42 U.S.C. 3607(a)). The court held that petitioner had not shown that it was controlled by or operated "in conjunction with" the Catholic Church. Pet. App. A14-A15. To meet this standard, the court said,

> there must be a mutual relationship between the non-profit society and a religious organization. The

> existence of this relationship cannot depend solely on the activities of the non-profit organization nor be viewed only from its perspective. Indeed, evidence of the club's unilateral activities would go to whether it is itself a religious organization not to whether it is operated "in conjunction with" a religious organization. Furthermore, the Church's ability to withdraw permission to hold mass and the fact that on one occasion it may have indirectly influenced the club's Board of Governors by threatening to do so are not enough. Without further evidence of interaction or involvement by the Church, we cannot conclude that as a matter of law the Church controlled the defendant or that the defendant was operated "in conjunction with" the Church.

Id. at A15-A16.

The court also held that petitioner did not qualify for the private club exemption. Pet. App. A16-A20. The court concluded that petitioner did not provide "lodgings" within the meaning of the exemption because the bungalows are used as residences, not temporary accommodations. *Id.* at A18-A19. Moreover, petitioner does not qualify for this exemption because it applies only to the "rental or occupancy" of lodgings, not to their sale. *Id.* at A19-A20.

The court of appeals declined to address petitioner's arguments that application of the Fair Housing Act to the Club violated the Free Exercise and Establishment Clauses of the First Amendment and Club members' First Amendment associational rights. The court explained that it "preferr[ed] to have the district court consider [these arguments] in the first instance." Pet. App. A20.

Judge Mansmann dissented. Pet. App. A21-A28. She concluded that the Club met the Act's religious organization exemption. In Judge Mansmann's view, neither con-

trol nor mutuality determines whether an organization falls within the exemption. She concluded that the significant connections between petitioner and the Church are sufficient to bring it within the exemption. *Id.* at A25-A26. In addition, she concluded that petitioner met the mutuality standard. *Id.* at A26-A28.

ARGUMENT

1. Petitioner contends (Pet. 11-18) that this Court should grant certiorari to consider the First Amendment issues raised by application of the Fair Housing Act to the Club. Review of any constitutional issues that may be presented by this case would be premature. Not only is the court of appeals' decision interlocutory, but neither the court of appeals nor the district court has yet addressed the merits of petitioner's constitutional arguments. If, on remand, the district court finds that the Club has violated the Act, and that application of the Act to the Club does not violate the First Amendment, petitioner will have an opportunity to seek review of the constitutional issues, including, if warranted, review by this Court. Consequently, there is no reason for the Court to depart from its usual practice of declining to review interlocutory decisions, see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), and particularly of declining to review questions that have not been addressed by the courts below. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

In any event, petitioner's First Amendment claims are unpersuasive. Petitioner contends (Pet. 11-14) that applica-

tion of the Act to the Club would violate the members' right of expressive association by interfering with the Club's "genuine associational purpose [of] religious expression." Pet. 14. But there is no evidence that permitting non-Catholics to own bungalows would significantly interfere with the ability of Club members to engage in group efforts in pursuit of their religion. Moreover, the government's interest in eradicating discrimination in housing, which is compelling and unrelated to the suppression of expressive activity, outweighs any incidental burden that permitting non-Catholics to own bungalows may have on members' associational rights. See generally *Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537 (1987); *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984).

Petitioner also contends (Pet. 14-17) that application of the Act to the Club would violate the Free Exercise Clause. As the Court has recently made clear, however, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div., Dep't of Human Resources* v. *Smith*, 110 S. Ct. 1595, 1600 (1990). Petitioner fails to cite *Smith*. And even prior to *Smith*, it was clear that the policy of the Fair Housing Act—to provide opportunities for home ownership to all persons, without regard to religion—does not violate the Free Exercise Clause. Cf. *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (rejecting contention that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions").

Finally, petitioner contends (Pet. 17-18) that application of the Act to the Club would violate the Establishment Clause by requiring excessive government entanglement with religion. The Court has recognized that "routine regulatory interaction which involves no inquiries into religious doctrine * * *, no delegation of state power to a religious body * * *, and no 'detailed monitoring and close administrative contact' between secular and religious bodies * * * does not of itself violate the nonentanglement command." *Hernandez* v. *CIR*, 490 U.S. 680, 696-697 (1989). See also *Jimmy Swaggart Ministries* v. *Board of Equalization*, 110 S. Ct. 688 (1990); *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985). Moreover, the courts of appeals have held that application of Title VII and related employment discrimination laws to religious organizations does not result in excessive entanglement. See, *e.g.*, *EEOC* v. *Fremont Christian School*, 781 F.2d 1362, 1369-1370 (9th Cir. 1986); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1281-1282 (9th Cir. 1982); *EEOC* v. *Mississippi College*, 626 F.2d 477, 486-488 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981). There is no evidence that application of the Fair Housing Act to the Club would result in the kind of inquiry into religious doctrine or detailed monitoring that might violate the Establishment Clause.

2. Petitioner also contends (Pet. 19-25) that the Club is exempt from the anti-discrimination provisions of the Fair Housing Act. The court of appeals' decision to the contrary is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, this is the first reported decision of a court of appeals to consider the application of either the religious organization exemption or the private club exemption.[6] Thus, further review is not warranted.

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[6] In *United States* v. *Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975), the court held that the religious organization

a. The court of appeals correctly concluded that petitioner does not fall within the religious organization exemption because it is not "operated, supervised or controlled by or in conjunction with a religious organization, association, or society."[7] 42 U.S.C. 3607(a). The court of appeals' conclusion that the religious organization exemption contemplates a "mutual relationship" between the religious organization and the other organization is supported by the language of the exemption, its legislative history, and common sense. "Conjunction" means the "the state of being conjoined"; "conjoin," in turn, means "to join together (as separate entities) for a common purpose." *Webster's Ninth New Collegiate Dictionary* 277 (1984). Thus, the court of appeals was correct that "conjunction" implies a mutual relationship. In addition, the legislative history indicates that Congress's intention was to exempt religious institutions, such as churches and the various agencies, departments, and organizations under their control.[8] An organization cannot

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exemption was "inapplicable by its terms" to a private non-sectarian children's home because it was not a religious organization and the basis for discrimination was not religion.

[7] In its petition, petitioner contends (Pet. 19-20) that the Club is a religious organization within the meaning of the Act. Petitioner abandoned this argument in the court of appeals. See Pet. App. A12. In any event, the district court was correct in concluding (*id.* at A36) that petitioner is not a religious organization. Cf. *EEOC* v. *Townley Engineering & Mfg. Co.*, 859 F.2d 610, 617-618 (9th Cir. 1988) (Title VII's exemption for religious corporations and associations applies to "only those institutions with extremely close ties to organized religions * * *. Churches, and entities similar to churches, were the paradigm."), cert. denied, 489 U.S. 1077 (1989).

[8] The language of the religious organization exemption derives from a February 6, 1968, fair housing bill that Senators Mondale and Brooke introduced on the Senate floor. 114 Cong. Rec. 2270 (1968). On February 28, 1968, Senator Dirksen introduced his own fair housing bill "in the nature of a substitute." 114 Cong. Rec. 4570-4573 (1968).

exempt itself from the Fair Housing Act by unilaterally deeming itself to be, or conducting itself as if it were, connected to or affiliated with a religious organization.[9]

The court of appeals' conclusion that the Club lacked the requisite relationship with the Roman Catholic Church to qualify for the exemption is fact-bound and, in any event, correct. There is no formal or legal relationship between the Club and the Church or any Catholic umbrella organization. The Church neither mandated the formation of the Club nor required it to restrict its membership to Catholics. The Club's affairs are controlled by its Board of Governors; Club documents are not submitted to the Church for review or approval. Although the Church permits religious services to be conducted on the premises and provides a priest for this purpose, that is not sufficient to give the Church control over the Club. If the Church rescinded the privilege of

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The Dirksen bill, with modifications, was enacted as the Fair Housing Act; the Act retained the religious organization exemption of the Mondale-Brooke bill. See generally *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 147 n.29 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). A summary of Senator Mondale's proposal states that "[a]ll housing other than exempted housing of religious institutions would be covered," and that "religious institutions could continue to give preference in housing to persons of their own religion." 114 Cong. Rec. 2272 (1968). In addition, Senator Scott, in discussing Senator Mondale's proposal, stated that "[r]eligious institutions, or schools and other agencies affiliated with them, may give preference in housing to persons of their own religion despite the act." 114 Cong. Rec. 3252 (1968).

[9] The court of appeals correctly rejected petitioner's argument that the exemption should be read broadly. See Pet. App. A14-A15. Although the prohibitions of the Fair Housing Act are broad and inclusive, the exemptions are narrow and limited. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) ("The language of the Act is broad and inclusive."); *United States* v. *Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975) ("Congress created a carefully limited exemption for certain religious organizations.").

conducting masses on the premises, the Club would continue as a recreational homeowners' association.[10]

b. The court of appeals was also correct in holding that petitioner falls outside the private club exemption. That exemption applies only to the "rental or occupancy" of "lodgings." Petitioner's bungalows are sold rather than rented, and they are "dwellings" rather than temporary lodgings.

Congress deliberately deleted the word "sale" from the private club exemption.[11] As enacted, the exemption applies only to the "rental or occupancy" of otherwise qualifying lodging. Consequently, the court of appeals was correct in concluding that petitioner's "policy and practice of discriminating against persons in the sale of bungalows falls outside the plain language of the private club exemption." Pet. App. A19-A20. Petitioner's suggestion (Pet. 24-25) that it restricts only the rental and occupancy of bungalows is

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[10] If a church agreed to send a priest or minister to conduct services at a local retirement community, that would not entitle the community to discriminate on the basis of religion.

[11] The private club exemption was introduced in Senator Dirksen's amendment to his own substitute bill. 114 Cong. Rec. 4690 (1968); see note 8, *supra*. The original language of the exemption provided:

> Nor shall anything in this title prohibit a bona fide private club from limiting the sale, rental, or occupancy of dwellings which it owns or operates for other than a commercial purpose to members of the club or from giving preference to such members.

114 Cong. Rec. 4690 (1968) (emphasis added). Senator Kuchel subsequently introduced an amendment, which was adopted, that substituted the word "lodgings" for "dwellings," deleted the word 'sale,' and added the language "as an incident to its primary purpose or purposes." 114 Cong. Rec. 5526 (1968). Senator Kuchel stated that his amendment "seeks to tighten up the exemption" to "eliminate, for example, the possibility of a developer attempting to discriminate in the sale of tract homes by labeling the tract a private club." *Ibid.* He added that "[w]e are dealing here with the rental of property—that is to say, lodging in a bona fide private club." *Ibid.*

simply wrong. Mrs. Gualtieri did not want simply to rent or occupy a bungalow, she wanted to purchase her family's property interest in the bungalow. See Pet. App. A6. This case arose because petitioner refused to permit that sale.

In addition, the court of appeals was correct in drawing a distinction between residential "dwellings" and temporary "lodgings," and in concluding that petitioner's bungalows are dwellings rather than lodgings. The statute defines a "dwelling" as a building or structure that is designed or intended to be a "residence." Section 802(b), 42 U.S.C. 3602(b). Although the statute does not define "lodging," the legislative history indicates that Congress substituted the word "lodgings" for the word "dwellings" to narrow the private club exemption. See note 11 *supra*. Congress's deletion of residential structures from the proposed exemption suggests that it intended to exempt only temporary or transient occupancy (*i.e.*, in lodgings), not occupancy intended to endure for some substantial period of time (*i.e.*, in a dwelling). This reading of the statutory language is reinforced by the fact that Congress eliminated the word "sale" (which may apply to owner-occupied dwellings, but not to lodgings) from the statute. See *ibid.* Because the bungalows serve as Club members' primary residence during the summer, they are dwellings and not lodgings.[12]

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[12] Petitioner is not eligible for the private club exemption for two additional reasons. First, the bungalows are not offered as "an incident to [the Club's] primary purpose or purposes," 42 U.S.C. 3607(a), because the primary purpose of the Club is to provide owner-occupied seasonal dwellings for its members. Second, petitioner is not "a private club not in fact open to the public," *ibid.*, because it is not genuinely selective on a basis other than sex or religion.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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